separable.[19] But if to give effect to so much as is valid would bring about a result not desired or contemplated by the legislature, the whole law will be held unconstitutional.[20] This rule applies where the legislation is enacted in the light of an existing constitutional provision. But where, as in the present case, legislation perfectly valid when passed is affected by a subsequent change in the organic law, the situation is governed by the further principle that an addition to the fundamental law only repeals such prior constitutional provisions and statutes as are in conflict with it, in whole or in part.[21] On this basis all such portions of prior existing state legislation as contemplate the enforcement of prohibition remain in force, and are appropriate legislation under the terms of the Amendment.[22]

SHOULD IMPOSSIBILITY CAUSED BY A CHANGE IN FOREIGN LAW BE AN EXCUSE FOR THE NON-PERFORMANCE OF A CONTRACT? — It has been commonly held that impossibility caused by a change in foreign law is no excuse for the non-performance of a contract.[1] This is in accordance with the original common-law theory that impossibility is never an excuse for an express undertaking.[2] By modern law, however, there are several exceptions to this strict doctrine, among them one, now well established, where the subject matter or the stipulated means of performance are destroyed.[3] A further exception is often made where the means of performance that fail have been, in the contemplation of the parties, the only means available, even though not expressly con-

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[19] Presser *v.* Illinois, 116 U. S. 252 (1885); Fisher *v.* McGirr, 1 Gray (Mass.), 1 (1854); August Busch & Co. *v.* Webb, 122 Fed. 655 (1903).

[20] For cases where the unconstitutionality of part of a statute affected the validity of the whole, see Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540 (1902); Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601 (1895); Commonwealth *v.* Hana, 195 Mass. 262 (1907); Warren *v.* Mayor & Aldermen of Charlestown, 2 Gray (Mass.), 84 (1854).

For cases where the court held that the valid part of a statute was enforceable apart from the void part, see Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611 (1903); Lawton *v.* Steele, 119 N. Y. 226 (1890); State *v.* Davis, 72 N. J. L. 345 (1905).

[21] Griebel *v.* State, 111 Ind. 369, 12 N. E. 700 (1887); State *v.* Schluer, 59 Ore. 18, 115 Pac. 1057 (1911); Kansas City, Fort Scott & Memphis Railroad Co. *v.* Thornton, 152 Mo. 570 (1899).

In Trustees of University of North Carolina *v.* McIver, 72 N. C. 76, 89 (1875), Pearson, C. J., concurring, aptly compared the effect of a constitutional amendment on prior constitutional provisions and existing statutes to the effect of a codicil on a will or of a second deed on the original one.

[22] For cases concerning the effect of the Amendment and Volstead Act on prior federal legislation, see United States *v.* Windham, 264 Fed. 376 (1920); United States *v.* Sohm, 265 Fed. 910 (1920); United States *v.* One Essex Touring Automobile, 266 Fed. 138 (1920); United States *v.* Turner, 266 Fed. 248 (1920).

[1] Barker *v.* Hodgson, 3 M. & S. 267 (1814); Clifford *v.* Watts, L. R. 5 C. P. 578 (1870); Ashmore *v.* Cox, [1899] 1 Q. B. 436; Tweedie Trading Co. *v.* James P. Macdonald, 114 Fed. 985 (1902).

[2] Paradine *v.* Jane, Aleyn, 26 (1646). See also Dyer, 33 a. pl. 10.

[3] Taylor *v.* Caldwell, 3 B. & S. 826 (1863); Dexter *v.* Morton, 47 N. Y. 62 (1871); Ward *v.* Vance, 93 Pa. 499 (1880) (specified spring from which water was to be furnished); Clarksville Land Co. *v.* Harrison, 68 N. H. 374, 44 Atl. 527 (1896) (failure of stream down which logs were to be driven).

tracted for.[4] These exceptions, particularly the latter, are similar in principle to impossibility caused by a change in foreign law. And this analogy has been recognized and followed in a few recent decisions.[5] Thus in *Ralli Bros.* v. *Compañia Naviera Sota y Aznar*[6] a decree of a foreign government limiting the freight rates was held to excuse the charterer from paying any excess over the maximum rate specified, where his charter party had been made before the passage of the act and called for a much higher payment to be made on delivery at the foreign port.

The principle underlying the exception referred to above is similar to that upon which rests rescission of a contract for mutual mistake. Where the parties have in mind a definite assumption on which they are contracting, if that assumption is an essential part of the contract and turns out to have been ill-founded, equity considers it fair to give relief.[7] Should not the same principle be invoked in law if this assumption later fails after the contract is made? In each case there is destruction of the contemplated basis of the contract.[8]

As a matter of fact, however, the courts, in upholding these exceptions, do not talk about mistake, but use the machinery of implied condition on the theory that where there is a contemplated means of performance, there is an implied condition that if this fail, the promisor shall be excused.[9] Such a condition must generally be a fiction, and again makes the court's sense of fairness the real test.[10]

Neither of these lines of reasoning applies if both parties were not contemplating a particular means of performance. If the promisee has in mind only a general fulfilling of his order, the fact that the promisor's only means of performance is destroyed will not help him at common law.[11] The law will not aid a man merely because a fair bargain later turns out to be hard.[12]

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[4] International Paper Co. *v.* Rockefeller, 161 App. Div. 180, 146 N. Y. Supp. 371 (1914) (tract of woodland); Lovering *v.* Buck Mountain Coal Co., 54 Pa. 291 (1867) (means of transportation).

[5] Horlock *v.* Beal, [1916] 1 A. C. 486; Scottish Navigation Co. *v.* Souter, [1917] 1 K. B. 222; The Kronprinzessin Cecile, 244 U. S. 12 (1916).

[6] [1920] 2 K. B. 287. See RECENT CASES, p. 328, *infra*.

The case of Trinidad Shipping & Trading Co. *v.* Allston & Co., [1920] A. C. 888 (Privy Council), has somewhat similar facts, but can be distinguished on the ground that no payments were to be made in the foreign state.

[7] Riegel *v.* American Ins. Co., 153 Pa. 134, 25 Atl. 1070 (1893); Duncan *v.* New York Ins. Co., 138 N. Y. 88, 33 N. E. 730 (1893); Cochrane *v.* Wills, 1 Ch. 58 (1865). See SALE OF GOODS ACT, § 6. See WALD'S POLLOCK ON CONTRACTS, Williston's ed., 606 *et seq.*

[8] See Horlock *v.* Beal, [1916] 1 A. C. 486, 512.

[9] See Horlock *v.* Beal, *supra*, 525.

[10] See F. A. Tamplin S. S. Co. *v.* Anglo-American Petroleum Co., [1916] 2 A. C. 397, 403. See 12 HARV. L. REV. 501; 19 HARV. L. REV. 462.

[11] Hale *v.* Rawson, 4 C. B. (N. S.) 85 (1858) (contract to sell tallow on arrival of particular ship not excused when no tallow on ship); Pacific Sheet Metal Works *v.* California Canneries Co., 164 Fed. 980 (1908) (non-arrival of expected tins to make cans); Blackburn Bobbin Co. *v.* T. W. Allen & Sons, [1918] 2 K. B. 467 (contract to sell Finnish lumber — promisor not excused when only means of performance was forbidden shipment from Finland, when promisee did not know this).

[12] See Cameron-Hawn Realty Co. *v.* City of Albany, 207 N. Y. 377, 381, 101 N. E. 162, 163 (1913). See also Paradine *v.* Jane, *supra*, and most of the cases on this subject between these dates. The common law might reasonably, however, have adopted

But both the theories of mistake and implied condition are applicable to the principal case, where the performance was rendered impossible by a change in foreign law. Both parties contemplated that the contract should be carried out in a foreign country. In the absence of an express provision to the contrary,[13] it can, therefore, be assumed that the parties contemplated that the transactions in foreign parts should be legal.[14] And it is further true that the legality of the transaction is just as much a means of performance as the ship that carried the cargo. If foreign law, then, renders performance of the contract illegal, the contemplated means of performance are gone and both parties should be excused.

There seems, therefore, every reason to support the principal case. It apparently overrules the well-known decision of *Jacobs* v. *Credit Lyonnais*.[15] The court attempts to distinguish the two on the ground that the impossibility in the latter case may have been due to a foreign war. But the principles outlined above should apply equally to either case, for whether the impossibility is due to a war or a change in foreign law, the contemplated basis of the contract is destroyed.

COMPULSORY REFERENCE IN ACTIONS AT LAW. — The term "compulsory reference" is ordinarily used to denote the act of a court in sending a pending cause, without the consent of one or more of the parties thereto, to a referee for examination and decision.[1] Under this procedure a jury is dispensed with and the hearing before the referee replaces a trial in court, judgment being entered or a decree made in accordance with the referee's report if it be accepted by the court.[2] As thus defined, compulsory reference has a very limited application in actions at law.[3]

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the view of the civil law, which is much less strict. See FRENCH CIVIL CODE, 1148; ITALIAN CIVIL CODE, 1226. There the promisee is excused if he cannot perform the contract because of *vis major* or fortuitous accident.

[13] The promisor can expressly contract to assume the risk of impossibility or destruction of the subject matter or means of performance. Finney *v.* Bennett, 49 Misc. 230, 97 N. Y. Supp. 291; Berg *v.* Erickson, 234 Fed. 817 (1916). See the well-known *dictum* of Maule, J., in Canham *v.* Barry, 15 C. B. 597, 619 (1855), "A man may, if he chooses, covenant that it shall rain to-morrow."

[14] Probably this particular thought would not occur to the parties, but if nothing appeared to the contrary, it would be bound up in their whole conception of the transaction. See 1 COL. L. REV. 529, 533; 15 HARV. L. REV. 418.

[15] 12 Q. B. D. 589 (1884). It is not clear from the case whether there was an actual illegality or merely a war. See Scrutton, L. J., in Ralli Bros. *v.* Compañia Naviera Sota y Aznar, *supra*, 301.

[1] See cases, note 3, *infra*.

[2] See cases, note 3, *infra*.

[3] The power to make such reference in actions at law does not exist at common law but is based exclusively upon statutes. Mead *v.* Walker, 17 Wis. 189 (1863).

Statutes giving this power in actions at law have usually been held to violate the right of trial by jury as guaranteed by the state constitutions. Grim *v.* Norris, 19 Cal. 140 (1861); Russell *v.* Alt, 12 Idaho, 789, 88 Pac. 416 (1907); St. Paul, etc. R. R. Co. *v.* Gardner, 19 Minn. 132 (1872); Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066 (1895); American Saw Co. *v.* First Nat. Bank, 58 N. J. L. 438, 34 Atl. 1 (1896).

In a few states statutes permitting such reference in cases involving accounts were in existence at the time when the state constitutions were adopted, and subsequent enactments have been held constitutional on this basis. Wentzville Tobacco Co. *v.*